# PRELIMINARY REPORT OF THE COMMITTEE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW ON THE CODIFICATION OF THE PRINCIPLES OF JUSTICE IN TIMES OF PEACE BETWEEN NATIONS, APPOINTED UNDER THE RESOLUTION OF THE SOCIETY OF APRIL 24, 1909.

*Resolution adopted at the Meeting of the Codification Committee April 26, 1910.*

*Resolved,* That the reports of the Sub-Committees on Scope and Plan and on the History and Status of Codification be adopted as the tentative report of the full Committee on Codification and referred to the Society at its Fourth Annual Meeting.

ELIHU ROOT, *Chairman.*

JAMES BROWN SCOTT, *Secretary.*

## REPORT OF THE SUB-COMMITTEE UPON SCOPE AND PLAN OF THE REPORT.

The Sub-Committee upon the Scope and Plan of the Report of the Committee appointed pursuant to the resolution adopted at the Third Annual Meeting of the American Society of International Law on April 24, 1909, respectfully reports as follows:

### SCOPE OF THE REPORT.

The work of codification confided to the committee is limited as to subject-matter and method of treatment by the language of the resolution, by the purposes of such codification as indicated in the preamble to the resolution, and by the reasonable assumption that a comprehensive and systematic treatment is required:

The resolution of April 24, 1909, reads as follows:

WHEREAS, the arbitration of questions of a legal nature between nations is recognized as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle; and

WHEREAS, the establishment of a permanent court of international arbitration is predicated upon principles of justice universally recognized; therefore, be it

*Resolved,* That the President of the American Society of International Law shall appoint a committee of seven members, of which he shall be *ex officio* the chairman, to report to the annual meeting of the Society in 1911 a draft codification of *those principles of justice, which should govern the intercourse of nations in times of peace;* and make a preliminary report, if possible, in 1910, sufficiently in advance of the meeting to be a subject for discussion at the Fourth Annual Meeting.

### LIMITATIONS BY THE RESOLUTION.

#### I. AS TO SUBJECT-MATTER.

Two definite limitations as to subject-matter are placed upon the work of the committee by the resolution:

(a) in the words, "principles of justice, which should govern the intercourse of nations;" and

(b) in the words, "in times of peace."

*a. Principles of justice,* etc.

The words, "principles of justice," mean more than the mere conceptions of moral obligations stated in abtract form; in addition to such fundamental conceptions, they mean, in connection with the work assigned to the committee, those manifestations or expressions of moral obligations actually applied, which have been or can be reduced to concrete rules of international conduct.

The words, "which should govern the intercourse of nations," limiting the words "principles of justice," can be more appropriately considered in connection with the limitatons as to Method of Treatment.

*b. In times of peace.*

The limiting words, "in times of peace," necessitate a determination of the exact meaning of the phrase. The committee should, therefore,

(1) define the word "peace;" and

(2) compare the condition, which the word implies, with the condition implied by the word "war."

For a full comprehension of the relative states of peace and war, it would seem to be advisable for the committee to discuss

(a) the reality of the attributes of independence and equality, which reason and utility assume, in time of peace, every state possesses, and upon which, as bases, are predicated the rules of international conduct; and

(b) the effect of physical force, as exercised in time of war, upon these assumed attributes of a state.

The committee should analyze those intermediate states between peace and war, which possess certain qualities, some of which pertain to peace, and some to war; and it should determine the extent to which coercive physical force may be exerted without destroying a peace existing between two nations.

II. AS TO METHODS OF TREATMENT.

In the phrase "which should govern the intercourse of nations," the word "should" is important as conveying an idea of obligation rather than enforced submission. By its use, however, the committee is given a greater latitude in its work than it would have if the word "shall" was used. Any one of three ways of treatment is, by the use of the word "should," open to the committee:

(A) Assuming, first, that only those principles of justice, which have found expression in rules of international conduct and possess the quality of enacted laws, are to be codified, and, second, that only those rules, which have received the express assent of a state by convention or otherwise are binding upon it, and that all other rules, not having the sanction of express assent are without authority, and, if followed, represent solely a state's sense of obligation, and are, therefore, outside the province of the committee's consideration, the committee's work would be limited to the body of rules actually in force. By adopting this view the codification would represent the present status of international public law in times of peace, as such

law is recognized by those who confine it to the narrowest limits. The result would be of special value for practical use, but it would manifestly require frequent amendment in the future.

(B) Assuming the broader point of view that the principles of justice and all rules of international conduct founded upon them possess from their very nature all the essential qualities of law, and that sanction by assent must be imputed to every civilized state, even though it has failed to give such assent in express terms, the codification would consist of a body of rules, which, in the fullest sense, "should govern [to use the language of the resolution] the intercourse of nations." Such a codification would be, to an extent at least, theoretical and idealistic, furnishing a standard to be attained rather than one already established.

Both of the foregoing ways of treatment offer advantages, one (A) in the practical benefit to be derived from the exact declaration of international rules, to which nations have given express assent, and the other (B) in the presentation of a higher standard of conduct than has as yet obtained in international intercourse, which might serve as a model for the future.

(C) The third way of treatment consists of a union, to a certain degree, of the practical and the ideal. Having declared a principle of justice, which has been generally recognized by civilized states, and the concrete rules flowing from it, which have been sanctioned by conventional or other express assent, a series of suggestions may be set forth as to a wider application of the principle, or proposals as to changes or modifications of the accepted rules so that they will more nearly conform to a strict application of the declared principle.

This method, which is in the nature of a compromise between the two methods previously stated, would retain the benefits of a codification of rules, which would be practical in their use, and also a condification of ideal rules. While the declaration of practice and theory in the same set of rules, when such practice and theory do not entirely harmonize, has a tendency to weaken the authority of each, the advantages to be gained appear to be sufficient to the subcommittee to warrant its adoption.

PRIMARY SOURCES OF INTERNATIONAL OBLIGATIONS.

A consideration should be had and a statement made as to sources of international obligations such as (1) Necessity, (2) Utility, (3) Morality, and (4) Civilized Usage. Such a statement should embody a consideration of (a) the existence of an international code of ethics, (b) the relation of usage to custom, (c) a definition of the term "civilized nation," (d) the relation of self-interest to abstract right in international intercourse, (e) the weight to be given to reciprocal compacts in determining rules of international conduct, and subjects of a similar nature.

RELATIVE VALUE OF AUTHORITIES.

There should also be considered critically and declared the relative value which should be given to authorities relied upon in defining and formulating in terms an abstract principle of justice or a rule of international conduct. Such a consideration and declaration should include, in more or less detail, (1) Custom, (2) Usage, (3) Conventional Provisions, (4) Diplomatic Agreements, (5) Decisions of International Tribunals and Commissions, (6) Writings of Publicists, (7) Diplomatic and other State Papers, (8) Decisions of Municipal Courts, (9) Dicta of Judicial Tribunals, and (10) Municipal Legislation. It would be appropriate also to discuss at some length the proper force and authority to be given to Precedent in the determination of the rules, and its relation to Custom and Usage.

DEFINITIONS.

The importance of the correct definition of words and terms should be stated in its relation to the work of codification, and also in its relation to the interpretation of international agreements and diplomatic correspondence.

SUMMARY.

The report of the committee should be divided into three general parts. *Part One* — An historical review of previous codifications of the rules of international conduct in times of peace; *Part Two* — An

introduction setting forth the limitations to the work of the committee as fixed by the resolution, the method of treatment adopted, the purposes sought, and the consideration of the preliminary subjects necessary to a right understanding of the reported codification; *Part Three* — The codification proper, consisting of statements of the principles of justice applicable in times of peace, and the rules of international conduct based upon such principles, which have been generally sanctioned by civilized nations, the definitions of terms used, the authorities relied upon in formulating such statements, suggestions as to the extension or modification of the principle and of the accepted rules to bring them into more perfect conformity with the principles stated.

## Plan of Codification

*Being Part Three of the Report of the Committee on Codification.*

### THE GENERAL SCHEME.

Following the general scope of the work of codification as outlined, the method of treatment would be to let the rules arising from an abstract principle follow the statement of that principle, each rule receiving a full consideration together with all subjects appurtenant to it, which require consideration. The method in the case of each principle would be as follows:

(1) The statement of the abstract principle in as simple and concise language as is possible, avoiding uncertain and ambiguous terms.

(2) The definition of all words and expressions used in the statement which require explanation.

(3) A review of the authorities relied upon in formulating the statement, discussing them in brief or *in extenso* according to the needs of each case.

(4) A consideration of the reasons for formulating the statement as given.

(5) Statements of the rules of international conduct which have been generally accepted, treating each rule separately as follows:

(a) A simple and concise statement of the rule.
(b) The definition of such words and expressions as require explanation.
(c) A review of the authorities relied upon in formulating the statement of the rule, together with such examples of its application as are appropriate.
(d) Proposals as to changes or modifications of the accepted rule.
(e) A restatement of the rule as changed or modified, if modifications are proposed.

(6) Suggestions as to the extension or limitation of the principle stated.

GENERAL SYNOPSIS OF SUBJECTS.

The principles of justice and rules of international conduct, which are to be treated under the scheme proposed, should relate to the subjects which are synopsized in a general way below. Necessarily the inclusion of certain subjects and the division and arrangement is tentative depending more or less, as they do, upon the results reached after a consideration of the scope of the committee's work and a substantial agreement as to that portion of its preliminary report.

PRINCIPLES OF JUSTICE IN TIMES OF PEACE AND THE INTERNATIONAL RIGHTS AND OBLIGATIONS BASED THEREON.

All RIGHTS and OBLIGATIONS, which relate to the intercourse between States, arising from

The *Primary* or *Fundamental Attributes* of Statehood consisting of

1. Existence,
2. Independence,
3. Equality.

The *Secondary* or *Derivative Attributes* of Statehood consisting of

1. Property and Territorial Jurisdiction.
2. Jurisdiction,
3. Diplomatic Intercourse.

## I. Primary or Fundamental Attributes of Statehood.

Definition of a State.

1. EXISTENCE
   - (a) *Territorial*
   - (b) *Political*
     - Government
       - Definition
       - Divisions
       - Recognition
   - (c) *New States*
     - Recognition

2. INDEPENDENCE
   - Definition
   - Real and Fictitious Character
   - (a) *Complete*
     - Freedom in internal affairs
     - Constitutional authority of treaty-making power
   - (b) *Partial*
     - Neutralized State
     - Protectorate
     - Colony
     - Sphere of Influence
   - (c) *Intervention*
   - (d) *Non-intervention*

3. EQUALITY
   - Definition
   - Real and Fictitious Character
   - (a) *Primacy*
   - (b) *Sphere of Influence*

## II. Secondary or Derivative Attributes of Statehood.

### 1. property and territorial jurisdiction.

(a) *Territory*

- Extent
  - Original State
  - Colony
  - Protectorate
  - Sphere of Influence
- Boundaries
  - Prescriptive
  - Conventional
- Acquisition
  - Occupation
    - following Discovery
    - following Annexation
  - Cession
  - Conquest
  - Prescription
  - Exchange
  - Accretion

(b) *Waters*

- High Seas
  - Freedom
  - Fisheries
    - Free-moving
    - Sedentary
- Marginal Seas
  - Limits
    - Coasts
    - Enclosed arms of the Sea
  - Innocent passage
  - Visit
    - Defense
    - Health
    - Revenue

Rivers
Boundary
Traversing territory

(c) *Servitudes*
Dominant Rights
Servient Rights

(d) *Embassies, Legations, and Consulates*

2. JURISDICTION { This division includes the Rights and Obligations of a State to Persons and Vessels, and of Persons and Vessels to a State.

(a) *Persons*
Nationals
Native and Naturalized
at home
abroad
in civilized States
in semi-civilized States } Extra-
in barbarous States } territoriality
Aliens
Domiciled and Visiting
Private Persons
Public Agents
Fugitives from Justice
Political Offenders

(b) *Vessels*
Of Nationals
Public and Private
On high seas
In foreign territorial waters
Of Aliens
Public and Private
On high seas
In territorial waters
Of Pirates
Of Slave Traders

(c) *Air ships*

3. DIPLOMATIC INTERCOURSE.
   (a) *Agreements*
      Conventional
         Subjects
         Interpretation
         Permanency
      Diplomatic
         Subjects
         Interpretation
         Limitations
   (b) *Controversies*
      Subjects
         Obligations to other States
         Obligations to Aliens
            as to Person
            as to Property
               Natural
               Contractual
      Settlement
         Agreement
         Judicial
            Joint Commission
            Arbitration
               Courts
               Awards
                  Acceptance
                  Rejection
         Coercion
            Grounds
               Public Wrongs
               Private Wrongs
                  to Persons
                  to Property
                     Natural
                     Contractual

Methods
Reprisal
Embargo
Peaceful Blockade

(Signed)
ROBERT LANSING,
CHANDLER P. ANDERSON,
CHARLES HENRY BUTLER,
L. S. ROWE.

WASHINGTON, D. C., April 9, 1910.

## REPORT OF SUB-COMMITTEE UPON THE HISTORY AND STATUS OF CODIFICATION.

The codification of international law was, it would seem, first proposed by the arch-priest of codification, Jeremy Bentham, and in comparatively recent years serious attempts have been made by various writers on international law either to codify the law of nations as a whole, or to state in the form of a code those principles which either actually do, or in the opinion of the writer should, constitute an adequate and progressive system of international law.

As in the domain of municipal, so in the field of international law, codification has had its partisans and opponents, and while the opinion of writers is divided on the subject, municipal codes have been laboriously framed and promulgated and a very considerable number of treaties and conventions have either stated or made the law on various branches of the law of nations. The question is no longer in the form of a proposal as in the days of Bentham, nor academic as it might not inaptly be considered in the days of Savigny, who took his stand against codification; it is no longer theoretical, although debated on principle; for the authoritative code of municipal law has made its appearance and the international statute is a forerunner of an international code more or less complete. The question is no longer one of expediency, but rather one of method: how can the codification of international law be undertaken and

executed in such a way as to foster and develop rather than to block or retard the growth of international law which admittedly exists but whose principles lack precision and authoritative statement?

The difficulties in the way of municipal codification exist in an exaggerated form in international law. Custom which is the life of both systems is checked, and the words of the statute bind lawyer and judge alike. Certainty is obtained at the expense of reason, and precision at the cost of flexibility and growth. The custom had been construed and its meaning fixed, the statute has to be interpreted and its meaning ascertained, and the doubt and uncertainty which the statute was to banish or cure hover about it and the proceedings to be taken under it. Whether or not it be advisable to frame and promulgate a municipal code, experience shows that it can be done; and the satisfactory results derived from the continental codes show that codification is not only possible, but successful, if carefully and thoughtfully framed by bodies of experts and practitioners. The legislature promulgates the recommendations of science and practice, and within the jurisdiction of the legislature the code not only has the force of law, but is the source of law as well.

A difficulty unknown to municipal codification meets us on the threshold of international codification; for the code is not the code of one nation, but of all nations if it be true to its definition and purpose. A government may digest its usages and practices and publish the result in the form of a code, but this is either a municipal digest of the law of nations, or the law of nations as understood and interpreted by the government. It has admittedly no extra-territorial effect, but it is undoubtedly valuable if well done and of great interest to other nations as an official statement of the practice of one nation. But even in this case the value of such a code would be very great as clarifying national sentiment upon the great problems of international law and as tending to give consistency to national policy, and at one and the same time familiarizes the public with the problems as stated and the policy as defined. The international code is a law for the nations, not made or prescribed by the one nor the many, but by all and accepted by all. How is such a code to be

framed? If each government should follow the example of the United States and issue a digest of international law we should then have municipal statements of international law, and the digest of common usage and practice would be a digest of law truly international. The existence of such digests would at least supply the codifier with the necessary material for his work. But the question reverts, who is to be the codifier?

When a municipal code has been promulgated it is interpreted by the courts and applied to all controveries properly arising under it and submitted to the courts. Justice is administered by the state and the judgment of the court is executed by the state, with the force necessary to overcome resistance. The supreme power in the state crushes opposition and forces its will upon the inferior. In the family of nations the relation of legal superiority or inferiority does not exist, and its members meet on the plane of legal equality. The code can not be imposed; it must be either framed in common or accepted by the nations, but if accepted and disputes arise concerning its interpretation there is no court of nations to which an appeal can be made and whose decision is binding. A court of nations may well presuppose a law of nations, just as a code naturally or properly requires a court. This question, however, is not necessarily connected with codification, for there is a law of nations, even although it does not exist in codified form, and the objection of the absence of a court would apply with equal force to an international law in whatever form it may be.

Another difficulty in the way of a code, which does not exist in a single nation, is the matter of language. It is generally true that the citizens or subjects of a particular nation have a common language, but if various languages are spoken within its bounds there is no difficulty in promulgating the laws in the languages of the country in question. A reference to Switzerland and Belgium suffices to show that there is no inherent difficulty in this phase of the subject. It is supposed, however, that nations could not easily agree upon one language, and if they did that the translation into the mother tongue would tend to modify the code. The difficulty is, however, more apparent than real; for if nations really want a

common code, it is as easy to agree upon an authoritative text in a foreign language as it is to agree that the text of a treaty or a convention in a foreign language shall be considered as the original, and that in cases of doubt or uncertainty resort shall be had to the original text. Such is the custom in the matter of the Hague Conventions, and the Hague Conferences show that nations may meet and transact their business in a foreign language if the desire to do so be present. It is equally obvious that the objection based upon language is of a minor nature and in no sense of the word insuperable.

In the foregoing remarks, it has been stated that the objections made to the codification of municipal law may likewise be made, and in fact have been made to the codification of international law, and it has been suggested that the opponents of the one are naturally to be expected to be opponents of the other. It does not follow, however, that partisans of municipal codification are likewise or necessarily partisans of international codification; because many of the advocates of municipal codification believe that the law of nations has not grown sufficiently to be reduced to definite and precise form, which tends to prevent or check growth, and that codification would be premature, and, therefore, injurious. If codification gives precision and clearness, then codification would be a benefit, and if the codification be subject to revision and modification, it is difficult to yield to the objection, although admitting its force. The Geneva Convention of 1864 concerning land warfare was revised in 1906, in the light and practice and experience, and the Hague Convention of 1899, extending to maritime warfare the benefits of the Geneva Convention of 1864, was itself revised at the Second Hague Conference in 1907. Again, the conventions for the pacific settlement of international disputes, and the usages and customs of land warfare of the First Hague Conference of 1899 were revised and improved by the Second Hague Conference of 1907. No objection was made to their revision, and some of the conventions of the Second Conference provide expressly for subsequent revision. The fear, therefore, that an international instrument prevents change and growth would seem to be negatived by the facts. It may perhaps be

said that the conventions referred to were in the nature of statutes creating new law rather than codification of existing law. This is in part true, but does not affect the question, for the statute as a whole, whether it created or codified law, was revised, and, therefore, can not be said to have stood in the way of progress.

But to return to the question. The partisan of municipal codification may object to the codification of the law of nations by reason of difficulties not present in the municipal but unfortunately existing in the international problem. The state may prescribe a code for all persons within its jurisdiction, and so may the states. The difficulty is greater in the latter than in the former case, but the difficulty does not change the nature of the problem. The difficulty is one of degree, not of kind. That nations may codify international law is evidenced by the fact that they have repeatedly done so, beginning with the much-abused Congress of Vienna down to and through the Hague Conferences of 1899 and 1907, and the London Naval Conference of 1908–9. It is true that they have not as yet undertaken the codification of international law as a whole; but their deliberate codifications cover a very wide field, as even a cursory examination of the proceedings of the two Hague Conferences amply suffices to show. The codification of the usages and customs of land warfare and the convention respecting the rights and duties of neutral powers in maritime war, to mention but two instances, deal with delicate and important questions, and cover a wide field. The successful codification of the principles of law within these two broad fields is a demonstration of the possibility of codification, at least within limits, and the action of succeeding conferences will doubtless codify the most important and pressing branches of international law, directly affecting the foreign intercourse of nations, so that codification will be the rule and noncodification the exception. Experience will improve the original text and keep it abreast of international needs. The difficulty of adapting these various conventions into a code, giving to each its appropriate place in the chapter and section of the code is not insuperable. Each international convention is not only a step towards ultimate codification, but the material whereof the code will be composed.

The next difficulty mentioned, namely, the absence of a court of nations, is not likely to furnish the opponents of codification with an argument for any great length of time; for the Second Hague Conference created an International Court of Prize for the judicial settlement of controversies arising out of the unlawful capture and condemnation of neutral property, and its institution within the course of the present year will provide a court for the interpretation and application of the international law applicable to questions of naval warfare.

The draft convention for the establishment of a Court of Arbitral Justice, adopted by the Conference and recommended for constitution through diplomatic channels, will no doubt be instituted at The Hague at no distant date for the judicial determination of all controversies of a judicial nature arising between nations in times of peace. The world will thus have an international judiciary, permanently composed and in session, for the interpretation and application of international law. It is true that these tribunals will lack a physical sanction, but this is due to the fact that international law as such lacks a physical sanction. The difficulty exists without a code, and the difficulty would be not greater but less if the law to be interpreted or administered existed in codified form.

It is evident, therefore, that the difficulties in the way of the codification of international law arise from the nature of international law, and seem to be in no way connected with codification as such. If the nations really wish a code of international law, the Hague Conference can meet the desire, or if the nations prefer a tentative codification of select titles of the subject, the Conference will likewise meet their desires. In the meantime, the carefully devised codifications of international law prepared by publicists and jurists of experience and authority, and the various partial codifications of the law of nations undertaken by learned private associations and societies, such as the Institute of International Law, the Association for the Reform of International Law, and the various national societies, such as the American Society of International Law, will point the way to ultimate codification, and furnish samples of codification on a large or small scale, which may be of considerable service to international legislators.

Passing now from generalities to a consideration of what has actually been done in the way of codification, it appears, as stated in the introduction, that the first proposal to frame a code of international law is due to Jeremy Bentham who, in 1787, gave the law of nations its present name of international law. The influence of this remarkable man has been confined neither to his own country nor to municipal law. His partisanship for codification may well seem a mania, and his proposals made at various times, to autocrat or president, to Mohammedan and Christian, to countries of the old as well as the new world, to furnish them with codes may well cause a smile in those who believe that law is an organic growth, arising from and meeting the needs of the people, and therefore incapable of being imposed from above or from without. But the fact is that whether or not Europe was influenced by Bentham, the new world has been Benthamized. In a passage from Gervinus, quoted by Monsieur Nys, it is said: "All the constitutions, all the laws of the new republics showed traces of Bentham's influence; all the addresses delivered in the various congresses prove that the orators were familiar with his works, of which, according to a calculation made by the firm of Bossange in 1830, thirty thousand copies had been sold in French translations." [1] Not only did Bentham give to the law of nations its present name; he dreamed of a court of nations, wrote an essay on Perpetual Peace, and proposed the codification of the law of nations.

At various times during his long and useful life, Bentham discussed the subject of international codification. First, it would seem, in an essay dealing with the objects of international law, written between 1786 and 1789 (first published in full by Bowring in 1843), and some forty years later, in 1827, he appears to have sketched the basis or preamble of an international code. Almost midway between these two dates, Dumont, the faithful disciple and translator, made known the master's views to the French reading public in chapter 23 of the "*Traités de Législation Civile et Pénale,*" published in 1802.

[1] Nys: Le Droit International, Vol. 1, p. 169.

The importance of Bentham in the movement for the codification of international law justifies a brief consideration of each of these projects.

In the first essay of 1786, entitled "Objects of International Law," [2] Bentham says, in speaking of universal international codes:

"If a citizen of the world had to prepare a universal international code what would he propose to himself as his object? It would be the common and equal utility of all nations: this would be his inclination and his duty. Would or would not the duty of a particular legislator, acting for one particular nation, be the same with that of the citizen of the world?"

To the question thus put Bentham replies in the affirmative:

"If, in conclusion, the line of common utility once drawn, this would be the direction toward which the conduct of all nations would tend — in which their common efforts would find least resistance — in which they would operate with the greatest force — and in which the equilibrium, once established, would be maintained with the least difficulty." Having accepted the principles of utility for nations, Bentham declares the objects of international law as follows:

"1. Utility general, in so far as it consists in doing no injury to other nations, saving the regard which is proper to its own well being.

"2. Utility general in so far as it consists in doing the greatest possible good to other nations saving the regard which is proper to its own well being.

"3. Utility general in so far as it consists in not receiving any injury from other nations, saving the regard due to the well being of these same nations.

"4. Utility general in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well being of these nations.

"5. In case of wars make such arrangements that the least possible evil may be produced consistent with the acquisition of the good which is sought for."

In framing an international code the codifier should proceed as if he were drawing up a municipal code.

[2] Works, edited by Bowring, Vol. III, pp. 537–540.

"A disinterested legislator upon international law would seek to promote the greatest happiness of all nations generally, by following the same course he would follow in regard to internal law. He would endeavor to prevent positive international offenses, to encourage the practice of positively useful action. He would regard as a positive crime every proceeding by which the given nation should do more injury to foreign nations, collectively, whose interests might be affected, than it should do good to itself. For example, the closing against other nations the seas and rivers which are the highways of the globe. In the same manner he would regard as a negative offense every determination by which the given nation should refuse to render positive services to a foreign nation when the rendering of them would produce more good to such foreign nation than it would produce evil to itself. For example, it having in its own power offenders against the laws of the foreign nation, it should neglect to do what depends upon it to bring them to justice.

"War is a species of procedure by which one nation endeavors to enforce its rights at the expense of another. It is the only method to which recourse can be had, when no other means of satisfaction can be found by complainants, having no arbitrators between them sufficiently strong, absolutely to take from them all hope of successful resistance. But if internal procedure be attended by painful ills, international procedure is attended by ills infinitely more painful — in certain respects, in point of intensity, commonly in point of duration, and always in point of extent.

"The laws of peace would therefore be the substantive laws of the international code: the laws of war would be the adjective laws of the same code."

Bentham regarded peace as normal, war as abnormal; and his chief desire, as evidenced in the essays on the principles of international law, is to devise means for the preservation of peace as well as means for the prevention of war. To prevent war, which he considers an unmitigated evil, he suggests:

"1. Homologation of unwritten laws which are considered as established by custom.

"2. New conventions — new international laws made upon all

points which remain unascertained; that is to say, upon the greater number of points in which the interests of two states are capable of collision.

" 3. Perfecting the style of the laws of all kinds, whether internal or international. How many wars have there been which have had for their principal or even their only cause, no more noble origin than the negligence or inability of a lawyer or a geometrician! "

A code, as here outlined, would indeed be elaborate, for it is not only to contain the unwritten laws established by custom, that is to say, to be a codification of existing law, but it is to include provisions on all points which remain unsettled, that is to say, a codification of the entire field of international law.

The project of 1827 is very interesting, and shows that Bentham had in mind a code to be drafted by the states and adopted by them. For, in the first article, he says: " The political states concerned in the establishment of the present all-comprehensive international code are those which follow:

" Here enumerate them in alphabetical order to avoid the assumption of superiority from precedence in the order of enumeration."

The code was to be framed by a congress in which each civilized, that is to say, Christian, state should be represented by a delegate. The text of this document is attached to this report as Appendix A.

The complete English text of the plan for an international code was, as previously stated, first published in 1843, and the full details of the later project of 1827 were only recently made known by Monsieur Nys in an article in *The Law Quarterly Review* for 1885, Vol. XI., pages 226–231.

Bentham's plan for an international code was, however, as previously stated, made public in 1802 by his friend and fellow-worker Dumont in the " *Traités de Législation Civile et Pénale,*" Chapter 23, pages 328–331. The international code, as here outlined, was to be a collection of the duties and rights of the sovereign towards every other sovereign. The code itself was to be divided into a universal code and particular codes. The first was to contain all the duties of the sovereign imposed upon himself, and all the rights

which he should possess in his relations with the other sovereigns. The special code for each state should contain a recognition of the rights and duties possessed by this state, whether based upon express conventions or reasons of reciprocal utility. The universal code should be composed of concessions and demands. The duties and the rights among sovereigns are considered as moral duties and rights, for, he says, we can hardly expect to see between all nations of the world universal conventions and tribunals of national justice.

Bentham then passes to the consideration of the laws composing the particular code, which are of two kinds: executed and executory. In the second division, he places the laws of peace and war which regulate the conduct of the sovereign and his subjects in times of peace or of war, and in the codification of these laws, the method employed for municipal codification is to be applied. For fuller details, see Appendix B for the plan of an international code as briefly sketched by Dumont in the treatise already cited.

The French Revolution has given the world a Declaration of the Rights of Man. But as man, however, did not live in a state of isolation, but in society, it was proposed to complete the first declaration by a second, entitled the Declaration of the Law of Nations. On June 18, 1793, Abbé Grégoire presented to the French Assembly a declaration consisting of twenty-one articles, but they failed to meet approval.[3]

Some two years later, the Abbé reintroduced them with the same result.[4] They created discussion within and without the chamber and are considered as a first tentative codification of international law. Monsieur Rivier says that the declaration "was not a code, but the rudiment of codification, proclaiming a small number of general and absolute principles. * * * On the whole, this project does honor to its author, who was not a jurist; it contains several just maxims and undoubted truths, borrowed from Vattel."[5] This code, interesting in itself, has a special interest as the first attempt

[3] Nys: Etudes de Droit International et de Droit Politique, pp. 394–396.
[4] Nys: Etudes de Droit International et de Droit Politique, pp. 403–406.
[5] Rivier: Principes de Droit des Gens, Vol. 1, p. 40.

to codify the law of nations.[6] It is, therefore, annexed as Appendix C to this report.

It would appear, therefore, that towards the end of the eighteenth century a philosopher, Jeremy Bentham, and a philanthropist, the good abbé and revolutionary bishop Grégoire, proposed the codification of international law; but the proposal neither produced any material nor sensible effect at the time. The codification of municipal law occupied public attention, and publicists and jurists either sided with Thibaut for codification or with Savigny against it. It may be said, however, in passing, that Savigny's objections to codification apply specifically to the attempted imposition of a general municipal code, composed of foreign elements, upon any particular nation, because national law must be the outgrowth of the national conscience. It is obvious that these objections have no proper application to international law by reason of its international or world origin. It is a fact, however, that his arguments are constantly used as if they were directed against international codification.

It was not until 1858 and 1862 that the subject of the codification of international law was discussed in legal circles, when the Russian jurist Katchenovsky read before the Juridical Society his two papers on the situation of international law, and proposed in his second paper its codification by the jurists of all countries acting in common.[7] A few years later, Mr. David Dudley Field forsook the field of municipal law and proposed at the meeting of the British Association for the Promotion of Social Science, held in Manchester in 1866, "the appointment of a committee to prepare and report to the association the Outlines of an International Code, with the view of having a complete code formed, after careful revision and amendment, and then presented to the attention of the governments, in the hope of its receiving, at some time, their sanction." A committee was appointed, consisting of jurists of different nations,

[6] As evidence of the influence of Abbé Grégoire's proposed Declaration, see the preface to G. F. de Martens' Einleitung in das positive europäische Völkerrecht (1796).

[7] Papers read before the Juridical Society, 1858, 1862, pp. 101 *et seq.*; pp. 555 *et seq.*

but, as was to be expected, they did nothing, and the "Outlines of an International Code," published in 1872, and revised in 1876, was the sole work of Mr. Field.

But in the meantime, an event happened which marks an epoch in the history of codification. The war between the States broke out in 1861, and the need was felt for instructions for the conduct of armies in the field. President Lincoln appointed a commission, which intrusted Professor Francis Lieber, of Columbia College, with their preparation. These instructions were approved by the commission and published as General Orders No. 100, and constitute in fact the first codification of the laws and customs of war.

"The Instructions for the Government of Armies of the United States in the Field" have not merely profoundly influenced the governments of other countries, but they formed the basis of the deliberations of the Conference of Brussels in 1874, and influenced indirectly the Hague Conferences of 1899 and 1907.

They have not only shown the advantage of national codification and of international codification of the laws of war, but they called into being the first successful attempt of general codification. Bluntschli states that he was moved to write his treatise on international law in the form of a code (1868) as a result of Lieber's Instructions, and it may thus be fairly said that Lieber's Manual is thus the starting point of the modern movement in favor of the codification of the Law of Nations.

It is, however, true that before the appearance of Bluntschli's codification in 1868 several attempts had been made to codify international law, but it cannot be said that they created sentiment in favor of codification. They did not forward the movement, and have but an historical interest.

In point of time, the first attempt seems to have been made, according to Monsieur Rivier, by Esteban de Ferrater, who published at Barcelona, in 1846–7, a work entitled *Codigo de Derecho Internacional,* "a two-volume, methodical collection of Spanish treaties with a short survey of international law, including the conflict of laws." [8]

[8] Rivier in Von Holtzendorff's Handbuch des Völkerrechts, Vol. 1, p. 514.

The *Saggio di Codificazione del diritto Internazionale,* of Agosto Paroldo, an Italian author, appeared in 1851, and is generally, though erroneously, considered as the first specimen of codification. It deals, however, chiefly with the conflict of laws, and only incidentally with international law, properly so called. (Rights of diplomatic agents, consuls and commercial agents in Titles IX, X.)[9]

The first attempted codification worthy of the subject and of very considerable value is the *Précis d'un Çode du Droit International,* published in 1861, by a young Austrian jurist, Alphonse de Domin-Petrushevecz. Neither the Spanish nor the Italian writer dealt with international law as such, and Rivier, particularly learned in the history of international law, considers Domin's *Précis* as the first in point of time as in value. The book, of which a copy is in the Library of Congress, consists of but 133 pages and 236 articles. Domin codifies international law (Articles 1–75), which he divides into peace and war, and conflict of laws (176–236). The codification is preceded by an introduction (pp. 5–22) in which the author explains his method. Where a general principle was recognized by several states he adopted it in the form in which it was generally expressed; where treaties were lacking, he looked to the publicists and took the opinion of the majority. In the matter of maritime law he followed his own judgment. The articles are accompanied neither by authorities, notes nor explanations of any kind.

It is not the purpose of the present report to discuss the well-known codifications of Bluntschli (1868), Field (1872, 1876), or Fiore (1890, 4th edition, 1909), which are familiar to students of international law. They show that the law of nations is susceptible of clear and precise statement, and may be made to assume the form of a code without great difficulty. The works of Bluntschli and Fiore are really treatises on international law, and the articles expressing the views of their authors as to what the law either is or should be are followed by notes, references and discussions. Mr. Field's work preserves the character of a code; the articles are clear

[9] For an analysis and criticism of this work, see Bulmerincq's Praxis, Theorie and Codification des Völkerrechts, pp. 180–181.

and expressed in legal language; the comments upon the articles show their origin, the authorities by which they are supported, and the reason for their existence. The code, which has been translated into French and Italian, is highly regarded on the Continent. An excellent example of private codification of a particular branch of international law is furnished by Professor Holland's Laws of War on Land (written and unwritten), published in 1908.

From this brief sketch it is apparent that the movement for codification of international law, although of recent origin, has made very considerable progress, and that there are not wanting admirable specimens of its successful execution by private persons, such as Bluntschli, Field and Fiore. The Institute of International Law, established in 1873 at Ghent, has furnished the most careful and scientific specimens of codification, covering many of the most important branches of international law. The first article of the statutes of the institute promises its support "to every serious attempt of gradual and progressive codification of international law." From its many admirable specimens of codification, the following may be mentioned as showing the wide range of its activity: The draft code of the law of war on land; a project for arbitral procedure long before the first Hague Conference met; a project on the law, the jurisdiction, and procedure in the matter of prizes; another upon the navigation of international rivers; a declaration of the international duty of neutral states; pacific blockade; occupation of territories; the expulsion of foreigners; the extent of jurisdiction in coastal waters; the bombardment of undefended ports, harbors, towns, etc.

It has been stated that the codification of international law is not confined to publicists, jurists and learned societies, but that the nations in conference have set themselves seriously to the task of giving statutory force to usage and custom, and have in the First and Second Hague Conferences dealt with many of the most important and fundamental questions of international law. Codification seems to be the order of the day, and it is probably safe to predict that in the course of a few years international treaties and conventions will have codified a large portion of international law,

even although no official and authoritative code be drawn up and promulgated by the nations.

(Signed)

JAMES BROWN SCOTT.
CHARLES NOBLE GREGORY.
PAUL S. REINSCH.
GEORGE G. WILSON.

WASHINGTON, D. C., April 26, 1910.

## *APPENDIX A.*

### BENTHAM'S PROPOSED CODE OF 1827.

Art. 1. The political states concerned in the establishment of the present all-comprehensive international code are those which follow. Here enumerate them in alphabetical order to avoid the assumption of superiority from precedence in the order of enumeration.

Art. 2. The equality of all is hereby recognized by all.

Art. 3. Each has its own form of government; each respects the form of government of every other.

Art. 4. Each has its own opinions and enactments on the subject of religion; each respects that of every other.

Art. 5. Each has its own manners, customs and opinions; each respects the manners, customs and opinions of every other.

Art. 6. This confederation, with the Code of International Law approved, adopted and sanctioned by it, has for its object, or say ends in view, the preservation, not only of peace (in the sense in which by peace is meant absence of war), but of mutual good-will and consequent mutual good offices between all the several members of this confederation.

Art. 7. The means by which it aims at the attainment of this so desirable end — and the effectuation of this universally desirable purpose — is the adjustment and pre-appointed definition of all rights and obligations that present themselves as liable and likely to come into question; to do this at a time when no state having any interest in the question more than any other has, the several

points may be adjusted by common consent of all, without any such feeling as that of disappointment, humiliation or sacrifice on the part of any; adjusted at a time when no detriment to self-regarding interest, on the part of any having or by the part of any supposed to have place, no such cause of anti-social affection will have place in any of the breasts concerned.

Art. 8. Of each of these several confederating states the government can do no otherwise than desire to be regarded as persuaded that its own form of government is in its nature in a higher degree than any other, conducive to the greatest happiness of the whole number of the members of the community of which it is the government; and by this declaration it means not to contest the fitness of any other for governing in the community in which it bears rule.

## *APPENDIX B.*

### PLAN OF THE INTERNATIONAL CODE.

*Contained in Bentham's*
*Traités de Législation Civile et Pénale.*
Vol. I., Chap. XXIII., pages 328–331.

As Translated by Dumont.

Le Code international seroit le recueil des devoirs et des droits du Souverain envers chaque autre Souverain.

Il peut se diviser en Code universel et en Codes particuliers.

Le premier embrasseroit tous les devoirs que le Souverain se seroit imposés, tous les droits qu'il se seroit attribués à l'égard de tous les autres sans distinction. Il y auroit un Code particulier pour chaque État, envers lequel, soit en vertu de conventions expresses, soit pour des raisons d'utilité réciproque, il se reconnoît des devoirs et des droits qui n'ont pas lieu à l'égard des autres États.

Le Code universel contiendra d'une part des concessions, d'autre part des demandes. Ordinairement la réciprocité aura lieu.

Ces devoirs et ces droits entre Souverains ne sont proprement que des devoirs et des droits *moraux:* car on ne peut guère expérer de

voir entre toutes les Nations du monde, des conventions universelles et des Tribunaux de Justice nationale.

Division des lois qui composent un Code particulier:

1. Lois exécutées — lois à exécuter. Les premières sont celles qui regardent les deux Souverains dans leur qualité de Législateurs respectifs, lorsqu'en vertu de leurs conventions réciproques, il font dans le recueil des lois internes, des dispositions qui y sont conformes. Tel Souverain s'engage à empêcher ses sujets de naviguer dans certains parages: il faut donc qu'il fasse un changement dans les lois internes pour défendre cette navigation.

Les lois à exécuter sont: 1°. Celles qu'on accomplit en s'abstenant simplement d'établir telle ou telle loi interne. 2°. Celles qu'on accomplit en exerçant ou en s'abstenant d'exercer une certaine branche du pouvoir souverain; par exemple, d'envoyer ou de s'abstenir d'envoyer des secours de troupes ou d'argent à telle autre Puissance étrangère. 3°. Celles dont l'accomplissement ne regarde que la conduite personnelle du Souverain donne: par exemple, celles par où il s'oblige de se servir ou de ne pas se servir de tel ou tel formulaire en s'adressant au Souverain étranger.

Second division. Lois de paix — lois de guerre — celles qui reglent la conduite du Souverain et de ses Sujets en temps de paix ou de guerre, à l'égard du Souverain étranger et de ses Sujets.

La même distribution qu'on a suivie pour les lois internes, soit pénales, soit civiles, peut guider pour l'arrangement des lois entre les Nations.

Dans le civil, par exemple, les démarcations de droits de propriété pour des immeubles, peuvent être les mêmes. Il y a des propriétés qui appartiennent en commun aux Sujets du Souverain donné. Il peut y en avoir qui appartiennent en commun au Souverain donné et à tel Souverain étranger, comme les mers, les grands fleuves, etc. Ainsi la République de Hollande avait acquis une espèce de *servitude négative* à la charge de l'Autriche sur le port d'Anvers. Ainsi, par la paix d'Utrecht, l'Angleterre en avoit acquis une autre à l'égard du porte de Dunkerque. Le droit de faire marcher des troupes à travers le pays d'un Souverain étranger est une espèce de *servitude positive.*

La guerre peut se considérer comme une espèce de procédure, par laquelle on cherche de part et d'autre à se mettre en possession des avantages qu'on s'est respectivement adjugés. C'est un exploit par lequel on fait exécuter tout un peuple. Le Souverain attaquant, c'est le demandeur: le Souverain attaqué, c'est le défendeur. Celui qui soutient une guerre offensive et défensive, resemble à un particulier qui, engagé dans un procès réciproque, soutient en même temps les deux rôles contraires. Ce parallèle n'est d'aucun secours pour la forme ou l'arrangement des lois, mais on peut en tirer parti pour introduire des principes d'humanité qui adouciroient les maux de la guerre.

Quand deux Souverains sont en guerre, l'état de leurs sujets change respectivement: d'étrangers amis, ils deviennent étrangers ennemis. Cette partie du Droit des gens rentre dans le plan des Codes particuliers où les Souverains ont pu stipuler des clauses relatives à ce changement.

## *APPENDIX C.*

### ABBÉ GRÉGOIRE'S DECLARATION OF THE LAW OF NATIONS.

1. The nations are among themselves in the state of nature, they have for bond universal morality.

2. The nations are respectively independent and sovereign whatever may be the number of inhabitants composing them and the extent of the territory which they occupy.

3. A nation should act towards others as it wishes others to act towards it; what a man owes to a man, a nation owes to another nation.

4. Nations should do in peace the greatest amount of good to each other, and in war the least harm possible.

5. The private interest of one nation is subordinated to the general interest of the human family.

6. Each nation has the right to organize and to change the forms of its government.

7. A nation has not the right to meddle in the government of the others.

8. The only governments in conformity with the rights of the people are those based upon equality and liberty.

9. Whatever may be used innocently and without exhausting it, as the sea, belongs to all, and can not be the property of any nation.

10. Every nation is owner of its own territory.

11. Immemorial possession creates the right of prescription between nations.

12. A nation has the right of entrance to its territory, and to exclude foreigners when its safety requires it.

13. Foreigners are subject to the laws of the country and punishable by them.

14. Banishment for crime is an indirect violation of foreign territory.

15. An attack upon the liberty of a nation is an attack upon all others.

16. Leagues having for their object offensive war, treaties or alliances which may injure the interest of a country are an attack against the human family.

17. A nation can undertake war to defend its sovereignty, its liberty, its property.

18. Nations at war should allow free course to negotiations calculated to bring about peace.

19. Public agents which the nations send to each other are independent of the laws of the country to which they are sent, in everything pertaining to their mission.

20. There is no precedence between public agents of nations.

21. Treaties between nations are sacred and inviolable.